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SUPREME COURT, U.S.
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No. 07-1434

IN THE

Supreme Court of the United States

DIXIE NATIONAL LIFE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

MARTHA WARD, Individually and on Behalf of All Others Similarly Situated,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fourth Circuit's reliance upon and adherence to South Carolina statutory and common law in declining to defer to contractual interpretations of administrative agency staff members was correct in view of the *Erie* Doctrine and traditional notions of federalism and comity.

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INTRODUCTION

Petitioners request this Court review an unpublished opinion of the Fourth Circuit that rests solely upon State law and has not resulted in the final adjudication of the case. The Fourth Circuit adhered to *Erie* principles by relying upon South Carolina law when ruling upon the central issue of this case: the interpretation of a South Carolina contract. Petitioners, however, seek a "second bite of the apple" by claiming that the Fourth Circuit *incorrectly* applied South Carolina law and, in so doing, violated the *Erie* Doctrine as well as principles of federalism and comity.

The premise for Petitioners' claim to certiorari is flawed precisely because the Fourth Circuit relied upon South Carolina law in this very State-specific case. Furthermore, the Fourth Circuit's opinion correctly applied South Carolina precedent and poses no threat of a split between the Circuits. Finally, this petition is interlocutory in nature and certiorari would serve no interest of immediate importance or judicial economy. As a result, the Petition for Writ of Certiorari presents no compelling reason supporting an exercise of this Court's jurisdiction.

COUNTERSTATEMENT OF THE CASE

During the early 1990s, Dixie National Life Insurance Company ("Dixie") wrote the supplemental cancer insurance policies at issue and sold them throughout South Carolina. These supplemental insurance policies—many of which are still in existence—differ from traditional primary care health

insurance in that they do not require the coordination of benefits with the policyholder's other insurers or with Medicare. Rather, under the terms of these supplemental policies, the insurer makes direct payments to its insureds based upon the dollar amount of "actual charges" resulting from the insured's cancer treatment.

Although used nineteen times in the policies at issue, the phrase "actual charges" is not defined. Within the medico-insurance field, "actual charges" carries a multitude of different definitions. Pet. Appx. 11a. However, at all times relevant to this case, Dixie paid benefits in a manner wholly consistent with the definition of "actual charges" as later determined by the Fourth Circuit. Pet. Appx. 6a. In 1994, Dixie assigned all its cancer policies to National Foundation Life Insurance Company ("NFL"). For the next seven years, NFL paid benefits in a manner wholly consistent with the definition of "actual charges" as determined by the Fourth Circuit. Pet. Appx. 6a. Then, in late 2001 to early 2002, NFL unilaterally changed its practice. It reduced benefit payments to equal the discounted amounts accepted by medical providers in satisfaction of the patient's bill, perforce the provider's third-party agreement with the patient's general health insurer or group plan. Pet. Appx. 7a. This change resulted in a reduction of millions of dollars in benefits paid.

Respondent Martha Ward sued to recover the difference between the actual charges billed for her husband's medical treatment and the lesser amounts paid in benefits by NFL under its new definition of actual charges in Mrs. Ward's cancer policy. She brought two

South Carolina common law causes of action still applicable to this case: breach of contract and breach of contract accompanied by a fraudulent act. Ward moved for the certification of a multi-state class of plaintiffs who purchased policies similar to hers. The District Court declined to certify a multi-state class action, but did certify a class of South Carolina policyholders. Pet. Appx. 8a. Both the Plaintiff class and Petitioners thereafter moved for summary judgment as to the meaning of the contractual term "actual charges". The District Court granted summary judgment to the Petitioners in an unpublished order, finding under State common law that the definition of "actual charges" is unambiguous and means the amount accepted by a medical provider from a third-party payor in satisfaction of the patient's bill.

The Respondent appealed the order of summary judgment and the order denying multi-state class certification to the Fourth Circuit Court of Appeals. Petitioners, meanwhile, cross-appealed the certification of the South Carolina plaintiff class. The Fourth Circuit—also in an unpublished opinion—reversed the District Court's order of summary judgment (finding the phrase "actual charges" to be ambiguous under South Carolina law) and remanded the case for trial. Pet. Appx. 4a. The Fourth Circuit also affirmed, however, the order denying multi-state class certification citing a lack of commonality in the laws of various states as they apply to Respondent's common law claims. Pet. Appx. 4a. The Court declined to address the Petitioners' cross-appeal of the South Carolina class certification, finding it to be interlocutory.

The Plaintiff petitioned the Fourth Circuit for a panel rehearing as to the issue of whether the case should be remanded for trial or whether, pursuant to South Carolina law, the ambiguity recognized by the Fourth Circuit was "patent" and required an entry of summary judgment in favor of the Plaintiff. The Fourth Circuit granted Plaintiff's petition and remanded the case to the District Court with the mandate that summary judgment be entered on behalf of Plaintiff Ward as to her breach of contract claim. Pet. Appx. 15a.

Defendants' petition for a writ of certiorari followed.

In the meantime, the parties continue to litigate this case before the District Court. While the Fourth Circuit's summary judgment mandate has been entered as to Respondent's breach of contract claim, the class's cause of action for breach of contract accompanied by a fraudulent act remains unresolved. Furthermore, while this petition for certiorari has been pending, Defendants have filed a new round of motions to dismiss before the District Court that have not been ruled upon.

SUMMARY OF THE ARGUMENT

The validity of Petitioners' request for a write of certiorari turns upon one question: whether the Fourth Circuit adhered to South Carolina law in declining to grant deference to the opinions of two South Carolina Department of Insurance staff members as to the interpretation of the contracts at issue in this case.

According to Petitioners, the portion of the Fourth Circuit's opinion giving rise to this petition is found within footnote 3.

> National and its supporting amici contend that, absent compelling reasons, we must defer to the Department of Insurance's interpretation of "actual charges." We disagree. Although an agency's interpretation of a statute it is charged with enforcing is entitled to deference, *see Dunton v. S.C. Bd. of Examiners in Optometry*, 291 S.C. 221, 353 S.E.2d 132, 133 (1987), the Department of Insurance has no statutory mandate to pronounce the meaning of a term in an individual insurance policy. We are of course interested in the Department's position, but South Carolina law does not in this case require us to defer to the Department's view of the matter.

Pet. Appx. 12a.

Petitioners insist the following "compelling reasons" exist for the Court to grant their petition: first, the Fourth Circuit's refusal to defer to the contractual interpretation of the Department of Insurance violates the *Erie* Doctrine as well as traditional notions of federalism and comity; and second, the opinion will have wide-ranging implications on insurance policies administered beyond the State of South Carolina. But as the text of the lower court's order notes, the Fourth Circuit relied upon and adhered to South Carolina law when ruling upon these South Carolina insurance

contracts at issue. Thus no compelling reasons exist for this Court to issue a writ of certiorari and the petition should be denied.

REASONS FOR DENYING THE PETITION

A. The lower court adhered to South Carolina law in declining to grant deference to the contractual interpretations of administrative agency staff

Petitioners' appeal to the *Erie* Doctrine as the basis upon which this Court should grant certiorari falls flat. Justice Brandeis wrote in *Erie* that

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.

Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

Thus the crux of Petitioners' argument must be that the Fourth Circuit's offending footnote not only misapplied South Carolina law, but fundamentally ignored State precedent and statute by declining to defer to an administrative agency's interpretation of a contract. The lower court's opinion, however, both observes and closely tracks South Carolina law for three reasons: first, the Department of Insurance has no statutory authority to interpret contracts; second, at any rate, no binding agency ruling was issued in this

case; and third, South Carolina courts do not defer to the opinions of agency staff.

The Department of Insurance is an administrative agency whose duties and powers are dictated by the State Legislature via statute. *See* S.C. Code Ann. § 38-3-10, *et seq.* South Carolina courts have established that "[a]s a creature of statute, a regulatory body is possessed of only those powers expressly conferred or necessarily implied for it to effectively fulfill the duties with which it is charged." *Captain's Quarters Motor Inn, Inc. v. S.C. Coastal Council*, 413 S.E.2d 13, 14 (S.C. 1991). As the Fourth Circuit noted, the Legislature has not conferred upon the Department of Insurance the power to adjudicate the meaning of disputed contractual terms within insurance policies. Thus, under the authority cited above, no such powers exist.

Petitioners contend that the Legislature's grant of "broad regulatory authority" over the insurance industry to the Department encompasses the ability to rule upon contractual disputes. Pet. 17. But nowhere within the statutory or regulatory scheme of the Department has the Legislature even hinted at transforming the Department into a judicial body with the ability to resolve disputes of contractual interpretation. In contrast, however, it is clear that throughout the Department's existence the judiciary has operated as the sole means of resolution of insurance policy contractual disputes. *See, e.g., Coakley v. Horace Mann Ins. Co.*, 656 S.E.2d 17 (S.C. 2007) ("An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law.") Had the

Legislature intended to grant such revolutionary powers to an administrative agency, it would have done so through a clear and explicit provision rather than through the vaguely worded "broad regulatory authority" cited by Petitioners. Because no such clear and explicit provision exists, the Fourth Circuit was correct in declining to defer to the Department's contractual interpretation.

Beyond the limitations on the statutory authority of the Department of Insurance, the opinion letters touted by Petitioners as "rulings" entitled to judicial deference have no legal efficacy. The South Carolina legislature has established that "[n]o order of the director or his designee is effective unless made in writing and signed by the director or by his authority." S.C. Code Ann. § 38-3-200. A review of the documents offered by Petitioners shows that neither letter was signed by the Director of the Department of Insurance, nor do they portend to be signed by the Director's authority. Pet. Appx. 63a, 67a. Rather these letters are merely opinions of regulatory staff. Furthermore, Patricia Wuzzardo—the author of the final opinion letter attached to Petitioners' brief—later attested that she was unaware of the varying definitions of "actual charges" within the medico-insurance field and, had this facts been made known to her, she would have "consulted with counsel for the South Carolina Department of Insurance prior to submitting any response to Ms. Ward." Resp. Appx. 3a. Wuzzardo's hindsight recantation lends credence to the wisdom of South Carolina's statutory mandate that only official orders of the Director of the Department are legally effective.

Furthermore, the South Carolina Supreme Court has declined to grant deference to opinion letters from agency staff such as those in this case. "The Panel, not [agency] staff, is entitled to deference from the courts." *S.C. Coastal Conservation League v. South Carolina Dept. of Health & Env. Cntl.*, 610 S.E.2d 482 (S.C. 2005). The refusal to grant deference to staff members stems from common sense: if the staff have no binding agency authority, the agency cannot be said to have rendered a ruling on the issue at hand.

South Carolina law limits deference owed to administrative agencies to two circumstances: first, the interpretation of regulations promulgated by that agency, *see Leventis v. S.C. Dep't of Health & Envtl. Control*, 530 S.E.2d 643 (S.C. Ct. App. 2000); and second, the interpretation of a statute the agency is charged with enforcing. *See Dunton v. South Carolina Bd. of Examiners In Optometry*, 353 S.E.2d 132 (S.C. 1987). The Fourth Circuit aptly noted that neither circumstance is present in this case. Rather the Department staff letters offered by Petitioners constitute interpretations of contractual language—a function that has not been statutorily bestowed upon the Department and has been traditionally reserved for the judiciary. As a result, the lower court correctly adhered to South Carolina law in respectfully declining to grant deference to the Department's contractual interpretation.

B. Because the lower court adhered to State law, no concerns of federalism, comity or of the *Erie* Doctrine arise

The Fourth Circuit's sound reliance upon South Carolina law eliminates the concerns of the *Erie* Doctrine as well as traditional notions of federalism and comity. *Erie* stands for the proposition that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Erie, supra.* Similarly, "comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, J., concurring). By adhering to South Carolina law in this case when declining to defer to the Department of Insurance, the Fourth Circuit observed the very principles that Petitioners argue merit certiorari.

Petitioners' appeal to one of the primary objectives of the *Erie* doctrine—discouragement of forum shopping—is curious, at best. All policy holders pertinent to this suit were South Carolina residents when their policies were purchased. This case was originally filed in South Carolina State court, but was removed to the federal District of South Carolina by Petitioners. The Fourth Circuit, in issuing its opinion, applied the substantive laws of the State of South Carolina. Quite simply, absolutely no forum shopping has taken place in this matter nor has the lower court impliedly encouraged future forum shopping by applying South Carolina's substantive law.

Petitioners' resort to the McCarran-Ferguson Act also rings hollow. The Act provides "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance". 15 U.S.C. § 1012(b). The Fourth Circuit did not rely upon an act of Congress in issuing its ruling and the Petitioners do not point to any such authority. Rather Petitioners contend that the lower court's failure to defer to the Department of Insurance's contractual interpretation constitutes a violation of the policy declaration of Congress. This argument may hold water if, in fact, the Fourth Circuit's opinion "invalidated, impaired, or superseded" State law. But again, the Fourth Circuit accurately *relied* upon State law and thus the McCarran-Ferguson Act is not implicated by its ruling.

The Fourth Circuit's reliance upon South Carolina law also disproves Petitioners' claims of a national, cataclysmic response to the decision below. Petitioners cite the recent case of *Guidry v. American Pub. Life Ins. Co.*, 512 F.3d 177 (5th Cir. 2007) as proof of the wide-ranging consequences of the Fourth Circuit's decision. To the contrary, however, *Guidry* specifically noted that the *Ward* opinion "applied similar rules of contract interpretation *under South Carolina law*." *Id.* at 184 (emphasis supplied). The controlling precedential effect of the Fourth Circuit's opinion is limited by the geographical scope of this suit. Because the lower court constrained its analysis to the application of South Carolina law no concerns of national interest arise. Furthermore, the Fourth Circuit chose not to publish the opinion giving rise to this petition—a decision that further mitigates Petitioners' claim of national importance.

C. The interlocutory nature of this petition weighs against granting a writ of certiorari

Petitioners ignore another compelling reason to deny review: the interlocutory nature of the ruling below. Although this Court has jurisdiction to review interlocutory decisions of federal courts of appeals under 28 U.S.C. § 1254(1), it seldom does so, and this case is not the rare case in which interlocutory review is appropriate. "Ordinarily, in the certiorari context, 'this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.'" Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002) (quoting *American Constr. Co. v. Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893) (emphasis added)); *see also, e.g.*, *Hamilton Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916) (interlocutory decisions are reviewed only "in extraordinary cases"). The posture of this case is anything but extraordinary. The Fourth Circuit reversed the judgment of the district court on the purely legal ground that the district court erred as a matter of South Carolina law in construing the meaning of the term "actual charges" in the parties' contract. The court remanded the case to the district court for further proceedings. Within these proceedings Petitioners have filed motions to dismiss on grounds wholly unrelated to this petition—motions which, if successful, will render the proposed question presented to this Court moot.

This case is an even less appropriate vehicle for immediate, interlocutory review than was true in

Virginia Military Institute v. United States, 508 U.S. 946 (1993) (*VMI*). There, the Fourth Circuit had issued a final decision holding that the Commonwealth of Virginia's sponsorship of a military college for men only was unconstitutional, but the district court had yet to rule on the appropriate remedy. The Court denied certiorari on the ground that the decision was not sufficiently final because the remedy phase had not been completed. *See id.* at 946 (Scalia, J., concurring). The Court recognized that there would be time enough to review the decision if that were necessary after the remedial portion of the case had concluded, *id.*, and, in fact, it later did so. *See United States v. Virginia*, 518 U.S. 515 (1996). Here, as in *VMI*, there is no decision regarding the appropriate remedy, and in fact another cause of action remains in dispute. Indeed, the Fourth Circuit refused, as "premature," petitioners' effort to obtain discretionary review over their petition for permission to appeal class certification under Federal Rule of Civil Procedure 23(f). Pet. App. 22a.

Respondent believes, of course, that she will prevail on the merits. If she does, Petitioners may appeal from the district court's final decision and, ultimately, petition the Court on the same purported *Erie* question that they have presented here. *See VMI*, 508 U.S. 946 (Scalia, J., concurring). Moreover, unlike the *VMI* case, which was sui generis, here, if petitioners are correct that Fourth Circuit's ruling will affect many cases nationwide, *see* Pet. 23-27, there will be any number of future vehicles that would allow this Court to resolve the question. To be clear: as explained above, the so-called *Erie*/federalism question set forth in the petition represents an inappropriate effort to persuade this

Court to review garden-variety issues of state law. And, therefore, in our view, those questions will *never* be worthy of a place on this Court's docket. But because of the case's interlocutory status, even if the Court were to disagree with our assessment of the cert-worthiness of *the issue* posited by petitioners, the Court should stay its hand and allow *this case* to run its course.

CONCLUSION

It goes without saying that this Court does not sit to review issues of State law. S. Ct. Rule 10. In this case, the Fourth Circuit indisputably resolved only issues of South Carolina law. The question whether the contractual term "actual charges" was ambiguous was one of South Carolina state law; so, too, was the question whether that ambiguity was "patent" and thus for a court to resolve. And the question about which the petitioners premise their claim to certiorari—whether the South Carolina Department of Insurance's views are entitled to deference—was undoubtedly a question of South Carolina administrative law, as the Fourth Circuit recognized, *see* Pet. App. 12a.

Because of the Fourth Circuit's reliance upon State law, the concerns of the *Erie* Doctrine and federalism and comity are not implicated by the ruling. Furthermore, even if Petitioners' allegations of a misapplication of State law are relevant to *Erie*, they are disproven by an analysis of South Carolina law. Finally, the interlocutory nature of this petition weighs against certiorari.

For the reasons described herein, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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